

BEFORE THE
Federal Communications Commission

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WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Carriage of the Transmissions)	CS Docket No. 98-120
of Digital Television Broadcast Stations)	
)	
Amendments to Part 76)	
of the Commission's Rules)	

REPLY OF

**ADELPHIA COMMUNICATIONS CORPORATION
ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION
INSIGHT COMMUNICATIONS COMPANY, L.P.
SUBURBAN CABLE TV CO. INC.
MEDIACOM LLC
PRIME COMMUNICATIONS--POTOMAC, LLC
TELE-MEDIA CORPORATION**

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SUMMARY

In response to the present NPRM, members of the broadcast industry (the “Broadcasters”) commented at length about the policies they believe support the imposition of a must-carry requirement for digital television (sometimes referred to herein as “DTV”). Many of the Broadcasters do not attempt to discuss the statutory and constitutional issues implicated by digital must-carry, an implicit concession on their part that the Communications Act (the “Act”), the Balanced Budget Act of 1997 and the First Amendment preclude the adoption of a mandatory carriage requirement during the transition period from analog to digital broadcasting.

In fact, there are no valid policies supporting digital must-carry. The basic premise of the Broadcasters — that mandatory carriage will propel the sale of digital receivers and, consequently, drive the transition forward — is flawed. Input selector switches have become widespread components in television receivers, video cassette recorders and cable customer premises equipment. These devices will provide cable subscribers with easy off-air reception of broadcast signals, thereby eliminating the “cable bottleneck” presumed by the Broadcasters. Further, cable programming networks are developing their own high-definition (“HDTV”) programming which will independently entice consumers to purchase digital receivers. The transition period will nevertheless be long due to the fact that many consumers will seek to maximize the usefulness of their existing analog receivers *during and after* the transition through the use of converter set-top boxes. Marketplace forces will determine the pace of the transition; the Commission should forbear from using its regulatory authority to influence this process.

Another area in which the Broadcasters’ comments miss their mark involves channel capacity. The Broadcasters suggest that most cable systems currently possess excess channel capacity which will accommodate the mandatory carriage of DTV signals. In fact, nearly two-thirds of the cable systems nationwide are channel-locked. System upgrades will not provide

sufficient future capacity in many cases since digital compression technology has a limited ability to maximize bandwidth. Furthermore, cable operators planning system upgrades have already allocated their excess capacity in response to consumer demands for the introduction of new and advanced services. Channel-locked cable operators will thus be forced to eliminate cable programming services to accommodate the mandatory carriage of DTV signals, a fact the Broadcasters tacitly acknowledge when conceding the hardship digital must-carry would impose on small cable operators and systems. The Broadcasters' willingness to provide small cable systems and operators with some form of must-carry relief is misdirected. Rather, smaller *broadcasters* should be granted extensions of the DTV build-out requirements should they be unable to develop digital programming of sufficient quality to merit voluntary carriage.

Digital must-carry, if imposed during the transition period, would require cable operators to retransmit programming substantially duplicative of that already carried on the Broadcasters' analog signals. The Commission makes substantial duplication determinations based upon programming content, not on format or the identity of the programmer. Therefore, identical programming simulcast in analog and digital formats would constitute substantially duplicative programming. Most of the initial DTV broadcasts have been simulcast in analog. As the transition progresses, *all* programming will eventually be simulcast in both formats pursuant to the Commission's phase-in simulcast requirement. A transitional digital must-carry requirement would thus violate the Act by forcing cable operators to carry substantially duplicative programming.

Six of the NPRM's seven carriage proposals would impose a mandatory carriage requirement at some point during the transition period, making them unworkable regulatory options. Several of the Broadcasters suggest that they instead be allowed to make separate

elections for their digital and analog signals. This suggestion is simply an attempt to reach must-carry by the back door. Under such a scenario, the Broadcasters would always choose must-carry for their DTV signals, knowing that marketplace and consumer demands would necessitate the voluntary carriage of their analog signals as well. Therefore, the only viable regulatory option is the NPRM's "no must-carry" proposal. Allowing the broadcast and cable industries to negotiate mutually agreeable retransmission consent agreements will allow marketplace forces to guide the transition, while ensuring that subscribers receive the diversity of programming they have grown to expect from cable television.

On this basis, the Commission should limit the scope of any transitional rules it might adopt to those necessary to regulate the manner of voluntary DTV carriage. For example, cable operators should be allowed to remodulate digital broadcast signals from vestigial sideband modulation ("VSB") to quadrature amplitude modulation ("QAM") for transmission over their system. Cable operators retransmitting HDTV broadcast programming should similarly have the ability to choose between 720p and 1080i format since both are considered high-definition. Neither of these practices would result in the material degradation of a digital broadcast signal. The Commission should forbear from regulation in other areas where it appears that technological developments are imminent, such as with channel and tier position. By allowing marketplace forces to guide the DTV transition to the fullest extent possible, the Commission will have a broad base of experience upon which to draw when determining the relevant carriage issues for the post-transition era.

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AND TELE-MEDIA CORPORATION**

Adelphia Communications Corporation; Arizona Cable Telecommunications Association; Insight Communications Company, L.P.; Suburban Cable TV Co. Inc.; Mediacom LLC; Prime Communications--Potomac, LLC; and Tele-Media Corporation (collectively, the "Joint Commenters"), by their attorneys, hereby reply to comments made in response to the above-captioned Notice of Proposed Rulemaking, released by the Federal Communications Commission ("Commission" or "FCC") on July 10, 1998.¹

The majority of comments were submitted by broadcasters seeking to invent policy reasons in support of transitional must-carry rules for broadcast digital television (sometimes

¹Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998) ("NPRM").

referred to herein as “DTV”) signals.² The fact that the Broadcasters largely limit their arguments to policy matters is not surprising. Existing statutory authority, including the Communications Act (the “Act”)³ and the Balanced Budget Act of 1997,⁴ make it clear that Congress did not authorize the Commission to impose any digital must-carry obligations until the end of the transition period from analog to digital television.⁵ In their initial comments, the Joint Commenters offered detailed First Amendment and statutory analyses demonstrating the patent

²Commenters with various broadcast interests include: Arkansas Broadcasters Association, Association for Maximum Service Television, Association of Americas’ Public Television Stations, *et al.*, Association of Local Television Stations, Inc., Barry Telecommunications, Inc., *et al.*, Benedek Broadcasting Corp., *et al.*, Capitol Broadcasting Co., Inc., Chris-Craft/United Group, Community Broadcasters Association, Cordillera Communications, Inc., Corporation for General Trade, Inc., Entravision Holdings, LLC, Golden Orange Broadcasting Co., Inc., Granite Broadcasting Corp., KSLS, Inc. and KHLS, Inc., Lee Enterprises, Inc., Maranatha Broadcasting Co., Inc., Morgan Murphy Stations & Cosmos Broadcasting Corp., National Association of Broadcasters, National Broadcasting Company, Inc., Network Affiliated Stations Alliance, Pappas Telecasting, Inc., Paxson Communications Corporation, Pikes Peak Broadcasting Co., *et al.*, Polar Broadcasting, Inc., Retlaw Enterprises, Inc., Shockley Communications Corp., Sinclair Broadcasting Group, Inc., State Broadcasters Associations, Station Representatives Association, Inc., Trinity Broadcasting Network, and UPN Affiliates Association (sometimes collectively referred to herein as the “Broadcasters”).

A number of consumer electronics manufacturers and retailers also submitted comments in support of policies aimed at promoting the sale of digital receivers: Consumer Electronics Manufacturers Association, Circuit City Stores, Inc., General Instrument Corporation, Harris Corporation, Hitachi, Ltd., *et al.*, Microsoft Corporation, New World Paradigm, Philips Electronics North America Corp., Sony Electronics Inc., Thompson Consumer Electronics, Inc., and Zenith Electronics Corp.

³47 U.S.C. § 151 *et seq.*

⁴Pub. L. No. 105-33, 111 Stat. 251 (1997) (amending, *inter alia*, Section 309(j) of the Communications Act).

⁵The fact that the Broadcasters ignore the plain meaning of these statutes and their legislative history by overreaching and asking for the mandatory carriage of all non-subscription digital broadcast services demonstrates their continued motivation to acquire the free use of spectrum in order to enter new service markets.

illegality of any transitional DTV must-carry obligations, and will not restate those arguments here.⁶ Suffice it to say, as Chairman Kennard has perceptively recognized, broadcasters seeking transitional DTV carriage rights face a heavy constitutional burden:

They need to make a compelling case to policy makers that they have a broadcast signal that uniquely serves the public interest, and if they're asking the government to go to cable — which has First Amendment rights — and ask it to basically prefer the broadcast speaker over their own editorial selections — well, that, in my view, is a fairly dramatic request to bring to government.⁷

Thus, rather than repeat the compelling legal reasons precluding the adoption of transitional DTV must-carry requirements, the Joint Commenters will address the various policy arguments raised by the Broadcasters in favor of digital must-carry.

Upon close examination, no valid policy exists supporting the mandatory carriage of DTV signals during the transition period. Rather, it becomes clear that the Broadcasters are trying to impose the burden, expense and risk of the transition upon the cable industry. Retransmission consent is a preferable means of securing the cable industry's participation in the conversion to DTV since it allows cable operators and broadcasters to negotiate mutually agreeable terms for the voluntary carriage of digital broadcast signals.⁸ Such a marketplace solution will ensure that

⁶The Joint Commenters also note with approval the Fifth Amendment taking argument made by the National Cable Television Association and others. See Comments of National Cable Television Association at 32-36 ("NCTA").

⁷Broadcasting & Cable, Nov. 18, 1998, at S10-11.

⁸Even as the Commission contemplates the current NPRM, cable operators are actively negotiating retransmission consent agreements with broadcast station owners for carriage of their DTV signals. For example, the recent agreement between Time Warner Cable and CBS Corp. ("CBS") will ensure the carriage of fourteen DTV stations owned and operated by CBS. Furthermore, "[n]egotiations are continuing between each of the four networks and cable TV companies such as Tele-Communications, Inc., and Cox Communications, Inc." "Cable TV

(continued...)

digital programming, whether broadcast or non-broadcast, earns carriage based on consumer demand rather than governmental fiat. As such, the Commission should limit the scope of any transitional rules to those relating to the manner of voluntary DTV carriage.

II. No Valid Policy Exists Supporting The Imposition Of Transitional DTV Must-Carry Rules

Many of the commenters advocate transitional DTV must-carry rules as a means of propelling the sale of digital television receivers and hastening the conversion to DTV. It is understandable why equipment manufacturers like Philips Electronics and Thompson Consumer Electronics take this position⁹ — they want to sell digital receivers. However, the Broadcasters argue for a transitional digital must-carry requirement because they wish to eliminate what they perceive as the “cable bottleneck” to a successful conversion to DTV.¹⁰ This argument misses the mark in several respects. First, input selector functions, which undoubtedly will be built into all digital receivers, allow cable subscribers to easily receive broadcast signals (whether digital or analog) off-air without the technical difficulties associated with mechanical A/B switches.¹¹ While

⁸(...continued)

Industry Touts Role in Increasing Competition,” TR Daily, Dec. 8, 1998.

⁹Comments of Philips Electronics North America Corp. at 8-11; Comments of Thompson Consumer Electronics, Inc. at 7, 12. See also Comments of Zenith Electronics Corp. at 2 (“Zenith”).

¹⁰See e.g., Comments of Arkansas Broadcasters Association at 6 (“Cable systems are now as much a ‘bottleneck’ to their subscribers for reception of DTV signals, as non-UHF-capable receivers were to viewers then for reception of UHF stations.”) (“Arkansas Broadcasters”); Comments of the Corporation for General Trade, Inc. at 4-6 (“General Trade”).

¹¹See Comments of Adelphia Communications Corporation, *et al.* at 33 (“Joint Comments”).

nearly two-thirds of viewers currently receive broadcast signals via cable retransmission, the widespread inclusion of input selectors in digital television receivers, video cassette recorders and cable customer premises equipment will give cable subscribers ready access to off-air reception.¹² To the extent that potential reception problems exist with DTV technology, that is an issue for the Broadcasters to resolve themselves.¹³ The Commission should not impose a digital must-carry requirement upon the cable industry simply to expand the reach of digital broadcast signals beyond their actual coverage areas.¹⁴ Indeed, the imposition of transitional must-carry rules would eliminate any incentive the Broadcasters might have to fix their reception problems.

¹²Indeed, the Broadcasters themselves have acknowledged the relative ease with which viewers can receive broadcast signals off-air as a result of recent advances involving input selector and antenna technology. See generally Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Notice of Proposed Rulemaking, CS Docket No. 98-201, FCC 98-302 (rel. Nov. 17, 1998). For example, the National Association of Broadcasters ("NAB") recognizes that "DBS operators are now in a position to offer local TV broadcasts [due to] powerful new antennae capable of tapping local TV channels with the mere zap of a remote control." Comments of NAB, CS Docket No. 98-201, at 3 (citation omitted). Likewise, affiliates of the four major networks concede that "due to a variety of technological improvements, more households today are capable of receiving an acceptable picture over the air than ever before." Joint Comments of the ABC, CBS, Fox and NBC Television Network Affiliate Associations, CS Docket No. 98-201, at 42.

¹³Some initial field tests have indicated that digital broadcast technology may be unreliable, particularly in urban and hilly areas. Paul Farhi, "A Defining Moment for TV?," Washington Post, November 1, 1998, at H15.

¹⁴The current NPRM contemplates a different factual scenario than that which arose in the analog context. In Turner Broadcasting System, Inc. v. FCC, 177 S. Ct. 1174, 1198 (1997), the 1992 Cable Act's analog must-carry provisions narrowly survived First Amendment scrutiny, in part "because [analog] stations were carried voluntarily before [the 1992 Cable Act]." Such is not the case with DTV. Digital broadcast technology is as yet largely unproven in the field. Therefore, the legality of any potential DTV carriage requirements and the quality of digital broadcast signals delivered to cable system headends must be examined anew. It is for this reason that individual signal strength disputes concerning analog broadcast stations are not instructive for the purposes of this NPRM. See, e.g., Comments of Maranatha Broadcasting Company, Inc.

Chairman Kennard has cogently recognized the bankruptcy of the Broadcasters' "bottleneck" argument: "But broadcasters do have an alternative delivery system to digital. It's an over-the-air technology. Cable is not their only gateway into America's homes."¹⁵

Second, the Broadcasters mistakenly assume that cable subscribers will delay purchasing digital receivers unless their cable operator retransmits local DTV broadcast signals pursuant to must-carry. To the contrary, cable networks are rapidly developing their own HDTV programming which is being specifically tailored to suit subscribers' tastes. For example, cable networks like Madison Square Garden Network ("MSG") and Home Box Office ("HBO") have taken the lead in presenting sporting events and movies in HDTV format.¹⁶ Cable subscribers eager to enjoy the benefits of such HDTV programming will purchase cable-ready digital receivers as soon as they become available, independent of whether their cable system retransmits digital broadcast signals.¹⁷ Cable operators carrying digital cable programming will have every incentive to negotiate retransmission consent agreements for those digital broadcast signals carrying desirable programming.¹⁸ It is therefore disingenuous for the Broadcasters to argue that

¹⁵Broadcasting & Cable, Nov. 18, 1998, at S11.

¹⁶Monica Hogan, "MSG and HBO Take Lead in HDTV," Multichannel News, November 2, 1998, at 3.

¹⁷A recent consumer survey revealed that one third of viewers are likely to subscribe to digital cable service. Horowitz Associates, Inc., "State of Cable '98," Fall 1998.

¹⁸Sporting events and movies are likely to be the types of HDTV programming viewers will most want to watch. See Glen Dickson, "CBS to broadcast NFL in HDTV," Broadcasting and Cable, October 5, 1998, at 6. Viewers are unlikely to care whether desirable digital programming emanates from a broadcast or non-broadcast source.

digital must-carry represents the sole means by which the sale of digital receivers and the conversion to DTV can be effectuated.¹⁹

Another way in which the Broadcasters' reliance upon must-carry is misplaced involves the economics of the marketplace.²⁰ The initial high cost of digital receivers may lead many consumers with limited financial resources to instead purchase set-top converter boxes so they may watch digital programming on their analog receivers. The Commission, consumer electronics manufacturers and retailers have all recognized that consumers will seek to maximize the usefulness of their analog receivers through the use of set-top boxes, even *after* the transition period has ended.²¹ Once analog receivers are no longer produced and existing equipment has outlived its usefulness, consumers will make the transition and purchase digital receivers. Mandatory carriage of DTV signals by cable operators will not alone guarantee the sale of digital receivers or quicken the pace of the transition. Rather, consumers will be motivated to purchase digital receivers as prices drop and quality digital programming becomes available from both

¹⁹Indeed, at the recent Dawn of Digital summit in Washington, D.C., "the need for exciting new DTV content to drive set sales was a common theme among broadcasters [since] 'there is a real dearth of HDTV programming to run.'" Glen Dickson, "TV welcomes digital dawn," Broadcasting & Cable, November 23, 1998, at 44 (citing in part Mike McCarthy, Vice President of A.H. Belo Corp.).

²⁰Comments of NAB at 14-18; Comments of Chris-Craft/United Group at 3-4; General Trade at 1-2; Comments of Shockley Communications Corp. at 2-4 ("Shockley").

²¹Fifth Report and Order, MM Docket 87-268, 12 FCC Rcd 12809, ¶ 114 (1997). Comments of Microsoft Corporation at 2-3 ("If history is any guide, the set-top box will be a key element in the transition to DTV."); Comments of Circuit City Stores, Inc. at 4 ("Sales of DTV receivers alone, no matter how brisk, will not accomplish the return of spectrum by 2006."). See Dickson, supra note 19, at 46 ("[O]ver the next decade or so every consumer home will need some sort of digital product to decode and show a picture on their set' ... '[p]eople need to understand that HDTV [sets] will not make today's analog TVs obsolete.'" (citing Robert Scaglione of Sharp Electronics Corp. and Bill Simms of Zenith).

broadcast and non-broadcast sources.²² If marketplace forces are allowed to operate freely in the absence of must-carry rules during the transition, cable operators will carry a mix of broadcast and cable digital programming tailored to consumer tastes. Without a double must-carry burden, cable operators will also be able to retain popular cable networks which typify the programming diversity available on cable television, such as Discovery, Bravo, ESPN and Lifetime. “Carriage should not be compelled because of the identity of the programmer rather than the merits of the programming.”²³

The Broadcasters seek the mandatory carriage of all free, over-the-air services which they intend to offer during the transition, including all ancillary and supplementary services which they might offer on a multiplexed, non-subscription basis in addition to their primary DTV programming transmission. Even ignoring the potential statutory conflict inherent in such a request,²⁴ the Broadcasters are presumptuous in their attempt to gain a free ride for new and experimental digital services together with their primary DTV programming service. They are in effect asking the Commission to provide them with a free distribution mechanism for any new services which they might provide in the future. This request goes far beyond the intent of the

²²It is for this reason that “[c]onsumer set manufacturers and retailers ... would like to see more HDTV programming. In the meantime, they are banking on consumers’ curiosity and selling them on how good NTSC programming and DVD movies look on HDTV sets.” See Dickson, supra note 19, at 46.

²³Comments of Cablevision Systems Corporation at 3 (“Cablevision”).

²⁴47 U.S.C. § 534(b)(3) (“A cable operator shall carry in its entirety ... the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system...”).

Act and the Commission's analog must-carry rules.²⁵ As a matter of public policy, the Broadcasters should not receive *gratis* what other video programmers must bargain for in the marketplace, particularly when each Broadcaster's analog channel will retain its must-carry rights during the transition.

II. The Broadcasters Overstate The Availability of Channel Capacity

A. Most cable systems today are channel-locked and plant upgrades will be insufficient to accommodate both advanced cable services along with all DTV and analog broadcast signals during the transition

Many of the Broadcasters mistakenly believe that cable operators have sufficient channel capacity to carry new DTV signals *in addition to* existing analog broadcast signals and cable programming networks.²⁶ In support of this belief, for example, NAB relies upon a commissioned study by Strategic Policy Research ("SPR") which analyses nationwide channel capacity data gathered from a privately maintained database.²⁷ SPR's analysis is undercut by its admission that "this database *appears* to be the most thorough and dependable publicly available source of [cable system] data, *although because it is somewhat dated, if [sic] provides conservative measures of*

²⁵In fact, changes in the video services market have led Chairman Kennard to question whether the broadcast industry continues to merit the special regulatory treatment it currently receives under the Commission's must-carry rules. FCC Chairman William Kennard, Remarks before the International Radio and Television Society (Sept. 15, 1998) ("[W]hat remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?").

²⁶See e.g., NAB at 24-35.

²⁷Id. at Appendix D, n.29. The database used by SPR is maintained by Warren Publishing, which publishes TV and Cable Factbook. By SPR's own admission, 49% of the data contained in the database is three or more years out of date. Id.

the current state of play.”²⁸ Indeed, in a tacit admission that the SPR analysis is unreliable, NAB’s comments largely focus on cable systems’ expected *future* capacity after planned upgrades are completed over the next decade.²⁹ The reason for this is simple. As noted by the Commission, “two-thirds of cable systems are currently channel-locked.”³⁰ If required to retransmit all DTV signals and their analog counterparts during the transition, cable operators would carry double their current must-carry load and most would be forced to drop many popular cable programming services.³¹

The Broadcasters’ expectation that cable system upgrades will create sufficient capacity in the future to accommodate transitional DTV must-carry is also unfounded. As an initial matter, many cable operators with limited resources will be unable to upgrade in the immediate future. Even for those cable operators who have or are about to perform upgrades, digital compression technology is not a panacea. Digital broadcast signals carrying HDTV programming will effectively occupy an entire 6 MHz cable channel, even if remodulated from vestigial sideband modulation (“VSB”) to quadrature amplitude modulation (“QAM”).³² It is thus disingenuous for

²⁸Id. (emphasis added).

²⁹Id. at 26-33.

³⁰NPRM at ¶ 45; see also NCTA at 41.

³¹NCTA at 41; Cablevision at 2-3; Comments of MediaOne Group, Inc. at 2-3, 21-22 (“MediaOne”). See Matthew G. Mercurio, “A Probability Model of the Effects of Digital Must-Carry Rules,” Economists Incorporated, Fall 1998 at 3 (“The proposed changes in the FCC’s must-carry rules during the so-called ‘transition period’ ... could entail substantial reductions in carriage of certain cable networks, such as the C-SPAN family of networks”).

³²Each 8-VSB modulated broadcast signal passed through by cable operators, regardless of their plant capacity, will take up an entire 6 MHz channel. Cable operators remodulating an 8-
(continued...)

the Broadcasters to suggest that planned cable system upgrades will create sufficient channel capacity for cable operators to carry a double must-carry load during the transition period without sacrificing popular cable programming networks. Furthermore,

while system upgrades do expand channel capacity, it is overly simplistic to conclude that a digital must-carry obligation would not impose serious constraints on upgraded systems. To the contrary, even in upgraded systems, such an obligation would deprive consumers of innovative and diverse video and non-video services they highly desire. This result is especially unjustifiable in light of the fact that, as noted, transitional digital must carry would substitute for these services largely duplicative broadcast programming that can only be received by a handful of high-income consumers with expensive digital TVs.³³

Consumer interests and programming quality should drive the video programming market as the broadcast and cable industries convert to digital technology. Cable operators who have upgraded their plant should be free to use any increased capacity to offer advanced cable services as planned.

B. The policy arguments against the imposition of must-carry rules apply with even greater force to small cable operators and systems

Small cable systems are more likely to be channel-locked and small cable operators possess limited resources, making them unable to upgrade their plant in the immediate future. It is for this reason that many such operators and systems use Headend-in-the-Sky ("HITS")

³²(...continued)

VSB broadcast signal to 64-QAM will only be able to place one 1080i HDTV service and a few SDTV services on each 6 MHz channel. The few cable operators planning to use expensive 256-QAM modulation technology will be able to compress two 1080i HDTV services on each channel. Letter from Decker Anstrom, President, NCTA, to Senator John McCain, Chairman, Senate Commerce Committee (August 14, 1998) at 2.

³³MediaOne at 24. See also NCTA at 42 ("The mere availability of channel capacity ... does not mean that operators are indifferent to its use or that broadcast stations should be favored over other program networks in carriage decisions.").

technology to increase the number of services they deliver to subscribers without incurring the cost of a system upgrade.³⁴ This satellite-based service allows cable systems to carry a package of up to six programming services on each 6 MHz of analog spectrum. It does not, however, increase the channel capacity of a cable system or allow the digital compression of other services. If subjected to a transitional must-carry requirement, small cable systems would have to eliminate existing services to make room for DTV signals. For those small cable systems using HITS technology, the number of services eliminated could be as many as six for each DTV must-carry station.

At the same time that the Broadcasters argue in favor of transitional DTV must-carry, they acknowledge the particular hardship it would impose upon small cable operators and systems. Many of the Broadcasters recognize that small cable operators and systems would be among those most adversely affected under a transitional DTV must-carry scheme and have conceded that they should be afforded accommodation by the Commission.³⁵ Others contend that the existing the one-third channel capacity limit in Section 614(b)(1)(B) of the Act would sufficiently protect small cable operators and systems.³⁶ This argument is illusory — the complexities of digital technology make it impossible to define the number of “usable activated

³⁴Joint Comments at 17-18.

³⁵See Comments of Association of Americas’ Public Television Stations, *et al.* at 23-28 (“APTS”); Comments of Association of Local Television Stations, Inc. at 50 (“ALTV”); Comments of Barry Telecommunications, Inc., *et al.* at 4; Comments of Polar Broadcasting, Inc. at 2; Shockley at 4.

³⁶Arkansas Broadcasters at 11; Comments of Cordillera Communications, Inc. at 7; Comments of Pikes Peak Broadcasting Co., *et al.* at 13-14.

channels” employed by cable systems.³⁷ The willingness of the Broadcasters to concede hardship in the case of small cable operators and systems demonstrates their awareness that DTV must-carry would overly burden channel-locked systems. Thus, when the Broadcasters overstate the availability of present and future channel capacity in their comments, they are in fact acknowledging the significant harm that digital must-carry rules would inflict upon *all* cable operators and systems during the transition period.³⁸

The Joint Commenters appreciate the willingness expressed by some broadcasters to magnanimously consider some form of relief for smaller cable operators unable to immediately double their must-carry load without significant dislocation of established viewing patterns.³⁹ The Joint Commenters certainly agree that the unreasonable burdens of transitional DTV must-carry are likely to fall especially hard on smaller operators. However, the Joint Commenters respectfully suggest that the Broadcasters’ concession is misdirected.

The Commission should continue its wise course of allowing DTV to develop based on marketplace factors, including allowing cable carriage to be determined in response to consumer

³⁷Each 6 MHz channel used by a digital cable system can transmit two 720p HDTV services or eight digitally compressed services. Depending on whether you define “usable activated channels” as each 6 MHz of spectrum or the total number of services transmitted over that spectrum, the cable system could be deemed to have one, two or eight “channels” for must-carry purposes. See Joint Comments at 29-30.

³⁸When the time comes for the Commission to consider post-transition must-carry rules, the consideration cited by the Broadcasters would warrant creation of a specific exemption for small cable operators and systems perhaps utilizing the rate regulation definitions contained in Sections 76.901(c) and (e) of the Commission’s rules. 47 C.F.R. §§ 76.901(c), 76.901(e).

³⁹Some Broadcasters, such as APTS for example, are apparently unwilling to grant blanket relief, but rather would place the burden on each small cable operator to demonstrate the necessity for relief on a case-by-case basis. APTS at 27-28.

demand. To the extent any “relief” is necessary, those broadcasters who have been unable to develop digital programming of sufficient quality to merit voluntary carriage should be granted liberal extensions of the DTV build-out requirements. Clearly, the larger and more affluent broadcasters are aggressively readying to commence digital broadcasts, with no assurance of must-carry protection. The availability of digital signals off-air from such broadcasters, in addition to voluntary cable carriage of digital programming from broadcast and non-broadcast sources, will be more than sufficient to “prime the pump” during the digital transition period. Thus, broadcasters unwilling to assume the risks inherent in a free marketplace approach should be allowed to defer their build-out — even to the extent of making a “flash cut” from analog to digital, thereby avoiding the costs of transitional operation of two signals.

III. Cable Operators Cannot Be Forced To Carry Duplicative Programming

Another way in which the Broadcasters attempt to justify their demand for transitional DTV must-carry is to reinterpret the Act’s prohibition against the mandatory carriage of duplicative programming. Section 614(b) of the Act plainly states that “a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system.”⁴⁰ The Broadcasters contend that this provision is inapplicable to DTV broadcast services in two ways. First, due to the fact that digital broadcast signals are transmitted by the same licensees as their analog counterparts, the Broadcasters assert that DTV signals do not

⁴⁰47 U.S.C. § 534(b)(5). Section 615 similarly applies to non-commercial educational stations. 47 U.S.C. §§ 535(b)(3)(C), 535(e). For simplicity of discussion, only Section 614 is discussed above.

qualify under the Act as the “signal of another local commercial television station.”⁴¹ Second, the Broadcasters suggest digital broadcast signals do not “substantially duplicate” the identical programming broadcast by that licensee in analog format.⁴² On both counts, the Broadcasters contort the plain meaning and effect of Section 614(b).

In its Report and Order implementing the must-carry and retransmission consent provisions of the 1992 Cable Act, the Commission specifically found that Section 614(b) “addresses [the] scenario in which [a cable] operator has sufficient channel capacity to carry all signals requesting carriage, but the programming on one or more signals substantially duplicates that of another signal.”⁴³ It is for this reason that the Commission defines “substantial duplication” for signal carriage purposes to mean the “simultaneous[] broadcast [of] identical programming for more than 50 percent of the broadcast week.”⁴⁴ It is the content of programming which drives this definition, not its format or the identity of its broadcaster.

The simulcast of identical programming in analog and digital format would clearly qualify as 100% “substantially duplicative” content under Section 614(b) of the Act. While the Commission has adopted a phased-in simulcast requirement as a part of its DTV rulemaking

⁴¹APTS at 33-35; Comments of Paxson Communications Corp. at 29.

⁴²Comments of Granite Broadcasting Corp. at 7; Sinclair at 4-5; ATLV at 64-65.

⁴³Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket 92-259, 8 FCC Rcd 9 at ¶ 59 (1993).

⁴⁴Id. at ¶ 60. Congress gave the Commission discretion pursuant to the 1992 Cable Act to define substantial duplication. Memorandum Opinion and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket 92-259, 9 FCC Rcd 6723 at ¶ 38 (1994).

proceeding,⁴⁵ most of the initial DTV broadcasts have been simulcasts of programming also transmitted in analog format.⁴⁶ Therefore, the mandatory carriage by cable of programming simulcast in analog and digital format *at any time* during the transition period would violate Section 614(b) of the Act.

IV. The NPRM's "No Must-Carry" Proposal Is The Only Viable Regulatory Option

Six of the Commission's seven carriage proposals represent variations on the must-carry theme and are therefore unworkable options.⁴⁷ Several of the Broadcasters suggest that licensees be allowed to make separate elections for their digital and analog signals.⁴⁸ This suggestion is nothing more than an attempt to cast the "Either-Or" carriage proposal in a more favorable light. If broadcasters were allowed to make separate elections, they would likely choose must-carry for their digital signals knowing that cable operators would be forced by marketplace and consumer demands to agree to retransmission consent for their analog signals. Cable operators would be in

⁴⁵Fifth Report and Order at ¶ 54. By no later than April 3, 2003, all broadcasters are required to "simultaneously broadcast identical programming" on their analog and DTV frequencies for at least "50 percent of the broadcast week."

⁴⁶See Farhi, supra note 13, at H16 ("ABC's '101 Dalmations' broadcast [was] simulcast in traditional analog and high-definition formats."). In fact, "PBS is the only broadcasting service that has announced plans to create original high-definition programming." Glen Dickson & Paige Albinak, "Digital gameplans at the TV networks," Broadcasting & Cable, Nov. 2, 1998 at 6.

⁴⁷The Immediate Carriage, System Upgrade, Phase-In, Either-Or, Equipment Penetration and Deferral proposals each contemplate the imposition of must-carry obligations at some point during the transition period. Id.; NPRM at ¶¶ 41-49.

⁴⁸NAB at 41-42; ALTV at 16-17; Comments of Benedek Broadcasting Corp., *et al.* at 24-25; Comments of Morgan Murphy Stations and Cosmos Broadcasting Corp. at 16-17.

the same position that they would if subject to an outright must-carry obligation — carrying both the analog and digital signals of local broadcasters during the transition.

The only viable alternative is the NPRM's "No Must-Carry" proposal.⁴⁹ Retransmission consent agreements will instead provide both sides with incentives to accelerate the conversion to digital and avoid the statutory, constitutional and practical difficulties associated with a double dose of must-carry. Broadcasters and cable operators should be guided by the marketplace in deciding the terms of voluntary carriage for DTV signals during the transition. In this way, consumer demands for diverse programming will be met through a wide array of broadcast and cable services.

V. Any FCC Transition Rules Should Be Limited To The Manner Of Voluntary Carriage

In order to promote the conclusion of retransmission consent agreements, the Commission should limit the scope of any transition rules which it might adopt to those necessary to regulate the manner of voluntary DTV carriage. Allowing cable operators to allocate their bandwidth efficiently will make it easier for them to add digital broadcast signals to their channel lineups. To this end, cable operators obviously must be free to demodulate VSB mode broadcast signals and remodulate them in QAM mode for transmission through their systems. This type of modulation conversion in no way degrades the content of the DTV signal. It does, however, allow cable systems using 64 QAM modulation to transmit signals 50% more efficiently than in 8 VSB

⁴⁹NPRM at ¶ 50.

mode.⁵⁰ Many of the Broadcasters concur that remodulation should be allowed since it does not constitute a material degradation of a DTV signal.⁵¹ A material degradation would certainly not occur in any situation where a broadcaster's HDTV signals can be received by cable subscribers in an HDTV format. Pursuant to standards adopted by the broadcast industry, signals broadcast in either the 720p or 1080i formats are equally considered "high definition." Thus, because broadcast industry standards recognize that any difference between the 720p and 1080i formats is not material, a cable operator should have the ability to retransmit HDTV signals in either format.⁵²

Flexibility of this type will be crucial to the success of the transition period. Cable operators will voluntarily retransmit those digital broadcast signals with the types of programming and services that consumers want to see. For example, cable operators are likely to negotiate with broadcasters for the voluntary carriage of some ancillary or supplementary services during the transition.⁵³ This type of experimentation will allow the video services marketplace to

⁵⁰MediaOne at 11-13.

⁵¹Comments of the Association for Maximum Service Television at 44; APTS at 44; Comments of National Broadcasting Company, Inc. at 2-3 ("NBC"). For example, ABC's first HDTV broadcast, the Disney movie "101 Dalmations" was transmitted in 720p format. Glen Dickson & Karen Anderson, "ABC goes high-def with '101 Dalmations,'" Broadcasting & Cable, Nov. 9, 1998 at 66.

⁵²For example, a signal broadcast in 1080i format could be retransmitted in either 1080i or 720p format without it constituting a material degradation of the DTV signal. See Joint Comments at 31.

⁵³Ancillary and supplementary services include, but are not limited to, fee and subscription-based services. See Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, Report and Order, MM Docket No. 97-247, FCC 98-303 at ¶ 7 (rel. Nov. 19, 1998) ("We recognize, of
(continued...)

function freely during the transition period and determine what services consumers want and how the broadcast and cable industries can best deliver them.⁵⁴

When crafting its transitional rules, the Commission should keep in mind that DTV is a new, untested and rapidly evolving technology. The Commission should forbear from regulation where it appears that technological solutions may supersede the need for government action. For example, electronic program guides and PSIP protocols are being developed which will allow viewers to locate programming services on-screen in a transparent manner, rendering channel and tier placement rules obsolete.⁵⁵ In the interim, the Commission should allow cable operators carrying DTV signals pursuant to retransmission consent to freely negotiate channel and tier placement with the affected broadcasters. Cable operators will have incentive to carry more DTV signals where placement decisions are left to the marketplace.⁵⁶

⁵³(...continued)

course, that feeable ancillary or supplementary services may be offered simultaneously with other services, including HDTV, SDTV, or other video programming supported entirely by commercial advertisements, or with other non-feeable ancillary or supplementary services.") (emphasis added). ALTV at 69; NAB at 37; Paxson at 26-27; Shockley at 3; Comments of Station Representatives Association, Inc. at 8.

⁵⁴However, voluntary carriage during the transition does not mean that ancillary or supplementary services will possess any carriage rights post-transition — the Act specifically prevents ancillary and supplementary services from claiming any right to carriage under Sections 614 and 615. 47 U.S.C. § 336(b)(3). Moreover, since cable operators cannot be required to carry more than a single primary video transmission from a given broadcaster, all other "multicast" transmissions, whether subscription or not, per se must be deemed "ancillary or supplementary." 47 U.S.C. § 534(b)(3).

⁵⁵NBC at 4.

⁵⁶This placement discretion should include the ability to create a separate digital basic tier. See Joint Comments at 31-32.

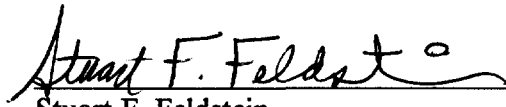
Finally, the Commission should refrain from deciding on any post-transition rules at this time. "The very breadth of the ... NPRM itself demonstrates the prematurity of any effort to impose digital must-carry requirements."⁵⁷ Experience gained during the transition period will inform the Commission, the Broadcasters and the cable industry as to the relevant carriage issues for the post-transition era.

VI. Conclusion

For all of the reasons set forth above, the Commission should not adopt any must-carry regulations for DTV signals that would apply during the transition period.

Respectfully submitted,

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⁵⁷Cablevision at 2.